IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. ~~756~~ 48

SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO, ET AL., Petitioners.

versus

O. V. WRIGHT, ET AL., Respondents.

Brief of Respondents Other Than Louisville and Nashville Railroad Company in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MARSHALL P. ELDRED,
Board of Trade Building
Louisville, Kentucky,
Attorney for Respondents Other Than Louisville and Nashville Railroad Company.

Of Counsel:

BROWN AND ELDRED,
Louisville, Kentucky,
Board of Trade Building.

WESTERFIELD BONTE CO. INCORPORATED, LOUISVILLE, KY.

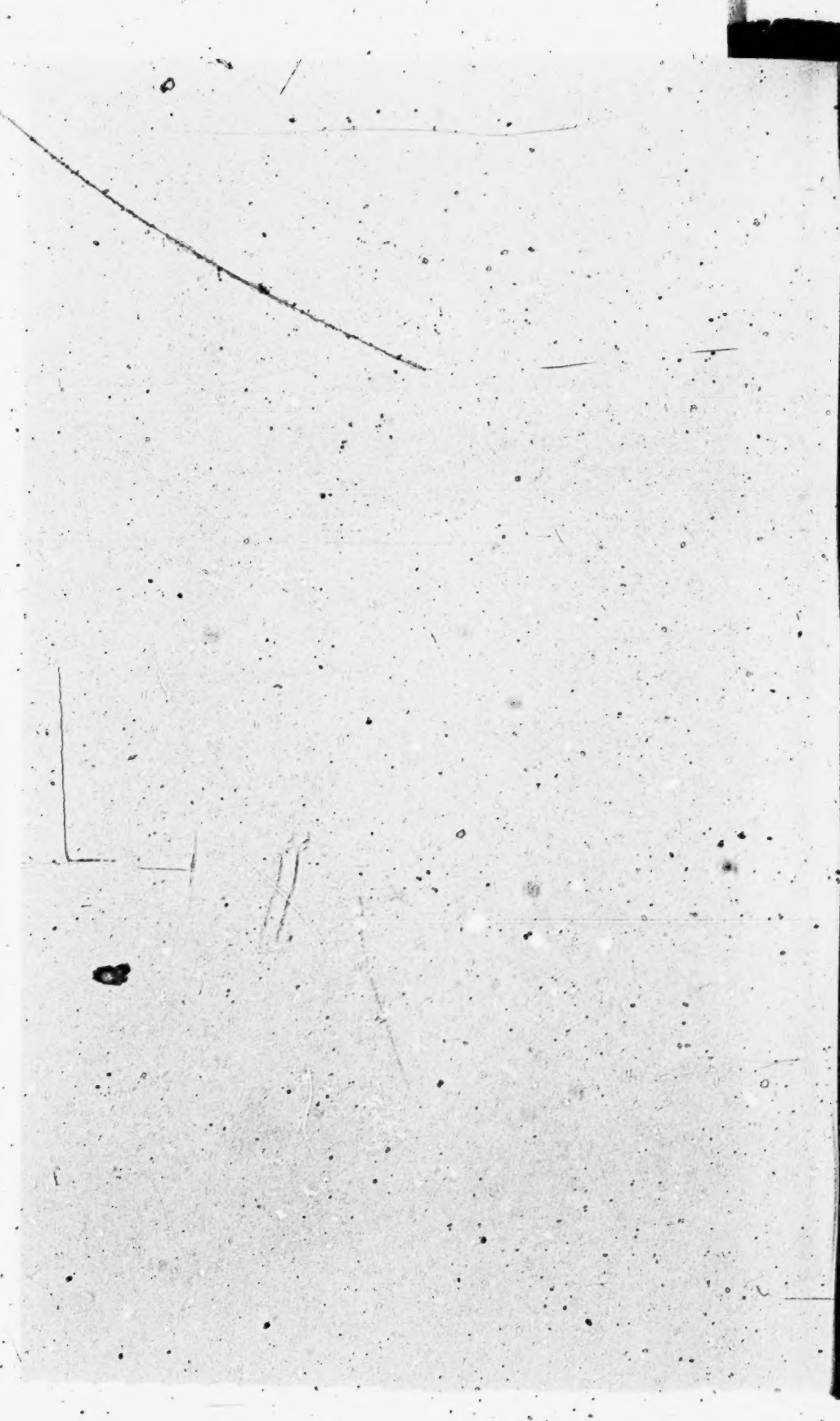

TABLE OF CONTENTS.

CITATIONS.

Cases:

Cases (Cont'd):

Statutes:

IN THE

Supreme Court of the United States

October Term, 1959.

No. 756.

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO, ET AL., - - - - - - - - *Petitioners.*

v.

O. V. WRIGHT, ET AL., - - - *Respondents.*

Brief of Respondents Other Than Louisville and Nashville Railroad Company in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

I. OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Kentucky, denying the motion for modification of the injunction, is reported in 165 F. Supp. 443. The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the District Court, is reported in 272 F. 2d 56.

II. JURISDICTION.

This Court has jurisdiction to review the action of the United States Court of Appeals for the Sixth Circuit by means of a writ of certiorari as provided in 28 U. S. C., Sec. 1254(1).

III. COUNTER-QUESTIONS PRESENTED.

1. Did the 1951 Amendment to the Railway Labor Act alone entitle statutory bargaining representatives, previously enjoined from requiring of non-union employees union membership as a condition precedent to employment benefits, to modification of the injunction so as to permit negotiation of union security agreements permitted but not required by such amendment?

2. Were such bargaining representatives precluded from obtaining modification of the injunction by the agreed settlement, by the parties, of all the issues in the case, including an agreement not to require union membership as a condition precedent to employment benefits, which agreement became the decree of the court?

3. Where the original complaint alleged discrimination by unions against non-union employees because of refusal to join and maintain membership in the unions, did the trial court properly consider unrefuted evidence of continued bitterness and hostility between the unions and non-union employees resulting from a strike upon the railroad's property?

4. In asking a modification of an injunction which protects an agreement not to require union membership as a condition to employment benefits, do unions come into court with clean hands when undenied evidence shows bitterness and hostility between the unions and non-union employees and threats of reprisal upon the part of the former against the latter?

5. Did the trial court abuse its discretion in refusing to modify an injunction based upon an agreed settlement of the parties which became the consent decree of the court where there is no change in the factual situation, where the change in the Railway Labor Act is permissive only and where a modification of the injunction would result in grievous wrong to non-union employees rather than to those who seek the modification?

6. Did petitioners meet the burden of proof of showing, as a result of the amendment to the Railway Labor Act, a grievous wrong evoked by new and unforeseen conditions?

7. Did the trial court, in refusing to modify the injunction, depart from the rule enunciated in *United States* v. *Swift*, 286 U. S. 106, 76 L. Ed. 999?

IV. STATUTE INVOLVED.

The statute involved in this case is the Railway Labor Act, as amended, being 45 U. S. C., Sec. 151, *et seq.*, and, in particular, SECTION 2, ELEVENTH, of said Act, being the Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U. S. C., SEC. 152, ELEVENTH, which amendment is copied in full on pages 2-4 of the petition for writ of certiorari.

V. COUNTER-STATEMENT OF THE CASE.

Petitioners in this case are the six shop craft unions named as defendants in the original complaint filed in the District Court of the United States for the Western District of Kentucky on July 16, 1945, together with the organization within which they worked upon the property of the Louisville and Nashville Railroad Company, known as System Federation No. 91, Railway Employees' Department, AFL-CIO (formerly American Federation of Labor). For the sake of brevity the six shop craft unions may be designated as machinists' union, boilermakers' union, sheetmetal workers' union, carmen's union, electrical workers' union, and shop laborers' union. (See 16a-18a.)*

Specimen counts from the original complaint (21a-36a) alleged discrimination by defendant unions and

*Unless otherwise indicated, numerals followed by the letter "a" refer to pages of petitioners' (appellants') appendix filed in the Court of Appeals, and numerals followed by letter "b" refer to pages of respondents' appendix therein filed.

defendant railroad against plaintiffs and the classes represented by them (being non-union employees of the railroad) in that certain employment benefits were denied to such employees because of their refusal to join or maintain membership in the shop craft unions.

There were twenty-eight of the original plaintiffs. Each sought to recover damages in the sum of $5,000.00, and, for themselves and the classes they represented, they sought a declaration of rights and a decree, the effect of which was that they were entitled to employment benefits without joining or maintaining membership in the defendant labor organizations. They also sought a permanent injunction against the defendant unions and the defendant railroad *perpetually* restraining and enjoining said defendants from requiring union membership as a condition to receiving employment benefits and from denying to the plaintiffs and the classes represented by them employment benefits because of their refusal to join or to retain membership in the defendant labor organizations (36a-40a).

Following the filing of the complaint below, depositions were taken by the union defendants and the railroad defendant, after which all of the parties entered into a *complete settlement* of the causes of action alleged in the complaint. A release was prepared and signed by all of the plaintiffs (70b-75b) wherein it was stated in part: "Whereas, it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner:" (70b).

The manner in which the settlement was to be effected was specifically set out, including "the entering of a consent decree", the purpose of which "will be to protect the undersigned against any future acts or practices of or by the defendants which will deny to the undersigned any of their rights and benefits under the collective bargaining agreements now in effect or which may hereafter be entered into in accordance with the Railway Labor Act by and between the L. & N. Railroad Company and System Federation No. 91, a copy of which consent decree is attached hereto"; the waiver and release by the said plaintiffs of all claims and the payment to all of the plaintiffs of the sum of $5,000.00 (70b-71b). The consideration for the release was stated to be the payment of $5,000.00 and "the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto . . ." (71b).

It is to be observed that in the settlement of their claims against the defendants, including the right of each individual plaintiff to prove damages and to seek a recovery therefor, the plaintiffs collectively agreed to accept a nominal sum in damages and the agreement of the defendants that plaintiffs and the classes represented by them would not then or in the future be required to join or maintain membership in defendant labor organizations as a condition precedent to employment benefits. This agreement was the real consideration for the settlement.

The original "Judgment, Decree And Injunction" was entered on December 7, 1945, pursuant to the settlement of the case. Its opening sentence reads: "By consent and agreement of all parties to this action, it is ordered, adjudged and decreed as follows:" (41a).

The decree provided that non-union employees of defendant railroad "shall from and after the date hereof" be entitled to certain rights of employment, without regard to membership in the defendant labor organization, as provided in collective bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act (42a-43a). The injunction, which was an integral part of the decree, enjoined the defendant unions and the defendant railroad from requiring non-union employees of the defendant railroad to join or retain membership in the defendant unions as a condition to receiving certain employment benefits arising out of or in accordance with bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act. It enjoined said defendants from denying to non-union employees employment benefits arising out of or in accordance with bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act because of the refusal of said employees to join or maintain membership in any of said defendant labor organizations (43a).

Non-union employees of respondent railroad have been diligent to protect their rights under the original decree and injunction. One example is a contempt

proceeding in this case which went to the United States Court of Appeals for the Sixth Circuit. *System Federation No. 91, et al.* v. *Reed,* 180 F. 2d 991.

Many non-union employees and some union employees of respondent railroad worked during a very bitter strike which occurred upon the railroad's property in 1955. Some of these employees testified at the hearing of this matter on February 3, 1958. Their evidence shows bitter hostility toward them and threats of reprisal and harrassment by defendant unions, if not loss of employment (1b-69b).

Respondents are zealous in preserving and protecting the rights which they won by consent and agreement of petitioners in the settlement of their original cause of action in this case. Responses to the motion to modify were filed by certain of the original plaintiffs (61a-65a, 74a-77a), and by certain intervenors (80a-88a).

The motion of petitioners to modify the injunction has been fully practiced before the District Court. There were interlocutory hearings and arguments, a formal hearing with introduction of evidence by respondents, and voluminous briefs were filed. Following all of this, the District Court on August 7, 1958, rendered his considered opinion and judgment refusing to modify the injunction (89a-103a).

On appeal to the Court of Appeals for the Sixth Circuit, the District Court was affirmed in a *per curiam* opinion (Appendix A, pages 1a-4a, Petition for Writ of Certiorari).

VI. REASONS FOR DENYING WRIT.

1. This Case Does Not Present an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The "important question" is: May an injunction issued by agreement of parties in connection with a "consent decree" be modified subsequently? The corollary follows: Under what circumstances may it be modified?

This Court has answered both questions, clearly and unequivocally, in *United States* v. *Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999. Indeed all parties to this case recognize *Swift* as the leading authority on modification of injunctions.

Respondents concede that even a consent decree may be modified. Petitioners and respondents disagree on requirements for modification. This Court has pronounced the formula:

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."
>
> . . . . . .
>
> "We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court." (*United States* v. *Swift & Co., supra.*)

The question here is not whether there is a right of modification, but whether petitioners in the District Court made a clear showing of grievous wrong, resulting from new and unforeseen conditions. The burden lay upon them to do so. *Ford Motor Company* v. *United States*, 335 U. S. 303, 93 L. Ed 24. They failed to meet this burden, as determined by the District Court and affirmed by the Court of Appeals. They introduced no evidence at the hearing below, either to meet the burden of showing a change of circumstances or in opposition to evidence adduced by respondents. They relied only on the amendment to the Railway Labor Act (45 U. S. C., SEC. 152, ELEVENTH) as warranting modification.

Actually, petitioners merely seek a review by this Court of a decision reached by the lower court on the record there made. The Court of Appeals for the Sixth Circuit reviewed this record and found no error in the order of the District Court in overruling petitioners' motion to modify the injunction. The Court of Appeals did not decide an important question of federal law not heretofore settled by this Court.

Petitioners seek refuge in SECTION 2, ELEVENTH, of the *Railway Labor Act* (45 U. S. C., SEC. 152, ELEVENTH), enacted subsequent to the entry of the original decree in this case, as the "new and unforeseen condition" which has evoked a "grievous wrong." They argue that the basis of the injunction was the Railway Labor Act. Therefore, the subsequent amendment of that Act entitles them to a modification of the injunction.

Respondents contend that the basis for the injunction was not the Railway Labor Act, but a voluntary and agreed settlement of the cause of action alleged in the original complaint. This original action sought monetary damages, declaratory relief and an injunction. In substance, the gist of the complaint (16a-41a) was that non-union employees of respondent railroad were denied certain employment benefits because they refused to join or maintain membership in defendant labor unions (petitioners here). Twenty-eight named plaintiffs settled claims for damages aggregating $140,000.00 for a nominal sum of $5,000.00 *and* a settlement of all issues in dispute, including the entry of a consent decree (70b-75b).

The decree provided that plaintiffs below, and the classes represented by them, should "from and after the date hereof," be entitled to certain employment benefits without regard to whether they joined or retained membership in defendant unions. The injunction prohibited defendant unions and defendant railroad from requiring membership in the unions as a condition precedent to enjoying certain employment benefits and "any other rights or benefits" which might arise out of or be in accordance with regularly adopted bargaining agreements then in effect between defendant unions and defendant railroad, or that might *"hereafter be in effect* between the defendant Railroad and the defendant Unions *in accordance with the Railway Labor Act"* (emphasis supplied) (41a-44a).

At that time (December 7, 1945) the Railway Labor Act did not permit a union shop. Therefore, it was not

necessary that the consent decree prohibit a union shop. But the parties agreed to that, not only in accordance with the Act as it then existed, but as it might thereafter exist.

The amendment of the Railway Labor Act to permit a union shop was not then unforeseen by the unions or by their astute counsel.

In 1943, two years before the entry of the decree in this case, petitioners attempted to obtain a union shop agreement upon respondent railroad in a proceeding before the National Railway Labor Panel Emergency Board in case No. A-1350. Mr. Willard H. McEwen was one of counsel for petitioners in that proceeding as well as one of counsel for petitioners in the original proceedings in this case. As shown in the Transcript of Proceedings of the National Railway Labor Panel Emergency Board, Book II, pages 1972-1981, at page 1980, counsel for petitioners in that case called upon the Board to recommend that the Railway Labor Act be amended to permit a union shop.

The "Supplemental Report To The President By The Emergency Board" appearing in Book II, *supra*, pages 2097-2167, at page 2106, contained notice served on respondent railroad by the cooperating railway labor organizations, including petitioners. This notice included a proposal for a union shop agreement. While the Board did not approve the proposal, nevertheless it is clearly seen that petitioners were making considerable effort under Section 10 of the Railway Labor Act to obtain a union shop agreement. It cannot be said, therefore, that two years later, when agreeing to the

judgment in this case, a subsequent amendment of the Railway Labor Act permitting a union shop agreement was unforeseen.

This Court has the authority to take judicial notice of a decision of the Emergency Board referred to above. *Bowles* v. *United States*, 319 U. S. 33, 87 L. Ed. 1194.

The injunction was consented to by the parties in order to protect and enforce their agreement that employment benefits would not in the future be made to depend on union membership. Such agreement was lawful when made. It is lawful today, for this Court has declared in *Railway Employees Department* v. *Hanson*, 351 U. S. 225, 100 L. Ed. 1112, that:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements."

The agreement of the parties, reached in a settlement of this case, became the decree of the trial court. The case was not submitted to the court for judgment except upon the agreement of the parties. Since the court did not determine the rights of the parties, the decree and injunction had to be based on something—the agreement of the parties that union membership would not be required for employment benefits, then or in the future.

Petitioners complain that a denial of their requested modification prevents the compulsory union shop the law now permits. They argue that unless the

decisions below be reversed, numerous unions on many railroads will lose their union shop agreements. Only the six shop craft unions (petitioners here) are involved and only union security of these unions on the Louisville and Nashville Railroad is affected. Moreover, the prevention of the union shop petitioners now covet on the respondent railroad's property does not result from the decisions below, but from the agreement petitioners voluntarily made with non-union employees of the Louisville and Nashville Railroad that union membership would not be a condition precedent to employment benefits. Since the amended Railway Labor Act does not *require* compulsory unionism, it is ineffective to change the agreement of the parties.

The injunction in this case does not protect rights which have ceased to exist. Those rights, agreed upon by the parties as establishing their relationship then and in the future, exist today. To the contrary notwithstanding the argument of petitioners, the injunction in this case is not the source of respondents' rights. That source is the agreement of the parties which became the judgment of the court.

Petitioners say their requested modification would not affect the basic prohibitions of the decree and injunctions. Such a conclusion is clearly illogical. The basic prohibition prevented petitioners and respondent railroad from requiring union membership in order to enjoy certain employment benefits. The modification desired by petitioners would permit a requirement of union membership to obtain or continue employment.

Modification must be consistent with the purpose of the original decree and calculated to effectuate and not thwart its basic purpose. *United States* v. *Radio Corporation of America,* 46 F. Supp. 654.

Petitioners rely on Rule 60(b) (5) of the Federal Rules of Civil Procedure, providing the court may relieve a party from a final judgment or order where it is no longer equitable that the judgment should have prospective application.

Petitioners have not made such a showing. Unrefuted evidence introduced by respondents in the trial below (1b-69b) clearly indicated bitterness and hostility between unions and non-union employees. It clearly disclosed abuse and mistreatment by union members of employees who worked during the 1955 strike, and threats of reprisals in the future if a union shop should come into existence. This evidence, as a whole, demonstrated that petitioners had not come into court with clean hands, that it would be inequitable to modify the injunction and that grievous wrong would result from modification, not from a refusal to modify.

The doctrine of "clean hands" is not a mere banality. It closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. *Precision Instrument Mfg. Company* v. *Automotive Maintenance Machinery Company,* 324 U. S. 806, 89 L. Ed 1381.

Modification or refusal to modify under Rule 60(b) is always within the sound discretion of the trial court and may be reversed only for abuse of that discretion. *Cole, et al.* v. *Fairview Development, Inc., et al.,* 226

F. 2d 175, and *Siberell* v. *United States*, 268 F. 2d 61. Petitioners have failed to show any abuse of discretion by the trial court. The Court of Appeals found none.

The provisions of Rule 60(b) were not intended to benefit the unsuccessful litigant after the time for appeal has expired. The procedure of the rule is not to be used as a substitute for appeal. A court is not permitted to act as a court of review under the guise of entertaining a motion to modify an original decree. *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244.

2. The Decision of the Court of Appeals Is Not in Conflict With Applicable Decisions of This Court or of Other Courts of Appeal.

Petitioners employ a clever argument in an effort to sustain their contention that the Court of Appeals' decision in this case is in conflict with applicable decisions of this Court and other Courts of Appeal. They state that the trial court construed the consent decree as a contract, which could not be modified, and that the Court of Appeals adopted the opinion of the District Court. Next they say that the court's authority to modify the injunction is unimpaired by the consent nature of the decree.

Their major premise is wrong. We concede their minor premise and disagree with their conclusion.

A reading of the opinion of the District Court will demonstrate the fallacy of petitioners' major premise. (See Appendix B, Petition For Writ of Certiorari.) The trial court did not construe the consent decree as

a contract. He referred to "the agreement which *underlay* the decree of December 7, 1945, . . ." (Emphasis supplied.) (See page 15a, Appendix B of Petition.) But he did *not* hold that he had no power to modify because of such agreement. To the contrary, he held the court had authority to modify notwithstanding the consent decree:

> "The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospective application of a judgment of injunction. This is the teaching of the case of the United States v. Swift & Company, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the Injunction was entered by consent" (Appendix B, page 16a, Petition).

Thus it is clear that the trial court's decision is not in conflict with *United States* v. *Swift & Co., supra; Coca-Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788, and *Chrysler Corporation* v. *United States*, 316 U. S. 566, cited by petitioners on page 16 of their Petition.

In view of the fact that the Amendment to the *Railway Labor Act* (45 U. S. C., SEC. 152, ELEVENTH), has been held by this Court to be permissive in *Railway Employes Department* v. *Hanson, supra,* the courts below did not err in refusing to recognize such amendment as sufficient ground for the requested modification. Nor are their decisions in conflict with the decisions cited by petitioners in their petition.

In *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 18 How. 421, 15 L. Ed. 435 (page 17, Petition), the basis for the subsequent dissolution of the injunction was not the change of any statutory law in existence at the time the injunction was granted. It was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. There was no change in factual circumstances. The bridge had never been an obstruction to navigation and the injunction should not have been issued in the first place.

In *Western Union Telegraph Co.* v. *International Brotherhood, Etc.*, 133 F. 2d 955 (page 18, Petition), the plaintiff obtained an injunction enjoining defendants from interfering, through a secondary boycott, with plaintiff's business. The Court of Appeals affirmed because it was believed that the conduct by the defendant was prohibited by the Sherman Act. Subsequently, the Norris-LaGuardia Act was passed. The defendants then filed their petition for modification of the injunction and the modification was granted by the lower court.

The Court of Appeals reversed with directions to the trial court to hear evidence to determine whether the defendants had mended their ways. A reading of the opinion clearly demonstrates that the right to modification was not based upon the passage of the Norris-LaGuardia Act but on the decisions of this Court, handed down since the injunction was issued

originally, holding that such activities as were enjoined were not in restraint of interstate commerce or violative of the Sherman Act. As the court said in its opinion:

> ". . . we are impelled to the conclusion under the circumstances here appearing, that the appellant cannot invoke the Sherman Act as a basis for injunctive relief."

There again we find a situation where the acts complained of were not contrary to law, as the court had originally believed. It was not a change in any statutory law.

In *Luaner* v. *Siegel,* 298 Pa. 487, 147 Atl. 699, 68 A. L. R. 1172 (page 18, Petition), there was involved the use and operation of a storage garage in an exclusively residential area. The court granted an injunction prohibiting the use of the garage as a public garage. Subsequently, the injunction was violated and the owners were adjudged in contempt. The defendants then sought a modification of the injunction permitting the use of the garage building for the storage of automobiles by tenants of nearby apartment houses. The court granted the modification, which was affirmed by the Pennsylvania Supreme Court.

However, the Pennsylvania court did not approve the modification of the injunction upon the ground of statutory change alone. The court, in the opinion, set out the formula for a modification of the injunction. We quote herein:

> "The modification of a decree in a preventive injunction is inherent in the court which granted

it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) where there is a change in the controlling facts on which the injunction rested." (Emphasis added.)

It should be noticed that the conjunction "and" appears between (a) and (b) and between (b) and (c) in the quotation above appearing. Thus we see that what the Pennsylvania court said is that modification of a decree *may be made* if the ends of justice would be served *and* where the law has been changed *and* where there is a change in the controlling facts on which the injunction rested. The single factor which more than anything else influenced the court in the *Ladner* case was a finding of a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were in use, was no longer so exclusively residential as to make the use of a storage garage a nuisance *per se*. Referring to the formula quoted above, the court said:

"It becomes apparent that the second and third reasons amply justify a modification of the decree, if there is nothing else to prevent it."

In *Santa Rita Oil Co.* v. *State Board of Equalization,* 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757 (page 19, Petition), there was involved an injunction issued by the Montana Supreme Court in an original

proceeding restraining the assumption, levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land on the ground of interference with a federal instrumentality. Upon application by the defendant, the decree was modified.

Originally the court enjoined the assumption, levy and collection of the tax because the lessee was an instrumentality of the federal government and such taxes interfered with governmental functions. The original injunction was issued upon the basis of the decision by this Court in certain cases holding that lessees of Indian trust patent land were instrumentalities of the federal government. Subsequently, this Court overruled these decisions (which the Montana court had followed) holding that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

In the *Santa Rita* opinion, the Montana court said:

> "It is a federal question whether these taxes constitute such an interference with the federal instrumentality as to be void and that question is now answered by the federal courts in the negative. Their decision on the point is binding upon this court."

The point is, the original injunction was issued because this Court had then said that the taxes in question would interfere with the governmental function. When this Court later confessed its error and held that such taxes did not interfere with governmental function, the Montana court properly modified

its original injunction. In essence, this was a change of factual background or situation and not a mere change of law. Whether or not taxes interfered with governmental function, while decided as a matter of law, is nevertheless actually a matter of fact. When the interference no longer existed, equitable considerations would compel the modification of the injunction.

The case of *National Electric Service Corporation* v. *District 50, United Mine Workers of America* (Ky.), 279 S. W. 2d 808 (page 20, Petition), involved an injunction issued by the Harlan Circuit Court enjoining picketing for the purpose of coercing plaintiff's employees in joining the defendant union. The jurisdiction of the court was challenged upon the ground that the acts complained of constituted an unfair labor practice, of which the National Labor Relations Board had exclusive jurisdiction under the Labor Management Relations Act of 1957. The lower court overruled the objection and the Court of Appeals refused to dissolve the injunction.

Subsequently, this Court handed down a decision in *Garner* v. *Teamsters, Etc., Union,* 346 U. S. 485, 98 L. Ed. 228, which held that a state may not enjoin, under its own labor statute, conduct which had been made an unfair labor practice under the federal statutes. Following this decision, the defendant in the *National Electric Service Corporation* case moved the court to vacate the injunction, which motion was sustained by the lower court and affirmed by the Court of Appeals.

The crux of the case is that the Kentucky court had no jurisdiction to issue the injunction in the first place because the Labor Management Relations Act conferred exclusive jurisdiction on the National Labor Relations Board. There was no change in the Act subsequent to the issuing of the injunction. It remained the same. The basis for the vacation of the injunction was the pronouncement by this Court that the state court had no jurisdiction.

Petitioners argue that the amendment to the Railway Labor Act removed a pre-existing statutory prohibition. They say: "The plain import and effect of the statutory amendment was to make union security agreements lawful, as a matter of uniform national policy under the Railway Labor Act."

But petitioners and respondent railroad agreed that they would not require union security agreements as a condition to the enjoyment of benefits of employment by respondents and the classes represented by them. This agreement, as set forth in the consent decree, contained no provision for modification in the event of a subsequent amendment to the Railway Labor Act, although the unions prior to that time had sought a union shop agreement on respondent railroad's property and had urged that, if necessary, the Act be amended to permit union security. There has been no change in this agreement. As shown by the record in this case, there has been no change in the factual situation sufficient to warrant modification. The change in the Railway Labor Act does not alter, in

the slightest, the agreement of the parties (which became the decree of the court) or the controlling facts.

Furthermore, in his opinion the trial court correctly stated that the Railway Labor Act, at the time of the entry of the consent decree, *did not prohibit the railroad and the unions from agreeing that a union shop should not obtain,* and that there is *no such prohibition after the amendment* (page 16a, Appendix B, Petition).

That the parties did thus agree, there can be no doubt. The purpose of the agreement was to accomplish a settlement of the entire controversy, leaving nothing for the court to determine. Since there was no judicial determination, the court's decree necessarily had to spring from something to give it being. That "something" was the agreement of the parties. This is shown by the first sentence of the original decree (Appendix C, page 20a of Petition): "By consent and *agreement* of all parties to this action, it is ordered, adjudged and decreed as follows:" (Emphasis supplied.)

The trial court, following the decision in the *Hanson* case (Appendix B, page 15a, Petition), correctly decided that the change in the Railway Labor Act, being permissive only and ineffectual to change the agreement reached by the parties in the settlement of this controversy prior to the entry of the original decree, did not authorize a modification of the injunction. The court correctly concluded, following the *Swift* case, that the amendment to the Railway Labor Act alone did not amount to a "clear showing of

grievous wrong evoked by new and unforeseen conditions".

Petitioners argue that the court below relied upon evidence of hostility and bitterness arising out of a 1955 strike as supporting the conclusion that there had been no change in the circumstances which would support that modification. While the court did consider undenied evidence of hostility and bitterness arising out of the 1955 strike, he stated:

> "The existence or non-existence of animosity, hostility or bitterness is not decisive of the question involved on the pending motion" (Appendix B, page 17a, Petition).

The court, however, did infer that because of the existence of this attitude on the part of the unions a modification of the injunction would require supervision of the conduct of the unions, which the court felt it should not undertake.

Petitioners argue that the evidence of the bitterness and hostility existing between union members and non-union members is irrelevant. With this we cannot agree. Such evidence demonstrates that the same ill will which existed between petitioners and respondents at the time of the filing of the original action continues today. If the injunction be modified and a union shop adopted, respondents who are the objects of ill will upon the part of the unions can be taken into membership and thereafter subjected to all manner of indignities and harassment, against which what remains of the decree and injunction would be powerless to protect.

The evidence heard in the trial below (1b-69b) cannot be read without obtaining an alarming picture of the threats of reprisal made to non-union men and union members who worked during the strike and who afterward were dropped from membership in the union.

The agreement between the unions and the carrier settling the strike contained a paragraph that there would be no prejudice or reprisal (58b). However, the Director of Personnel of respondent railroad testified that notwithstanding the no reprisal agreement he had received numerous complaints from many employees of abuses and indignities suffered because they worked during the 1955 strike, and that it was necessary, even at the time of the hearing, for the railroad to maintain special police (59b-60b). He further testified that about 40% of the railroad's employees in the shop crafts (the unions involved in this case) worked during the 1955 strike.

The injunction in this case gives to these employees the protection that the unions agreed to give them. A modification of the injunction would remove this protection and take from respondents and the classes represented by them that which they fought to obtain and that which petitioners agreed they might have. Such a modification would result in grievous wrong to respondents, not to petitioners. The modification would be inequitable. The equities to which respondents are entitled may only be preserved by a refusal to modify.

3. The Decisions Below Are in Accord With Applicable Decisions of This and Other Courts.

As has been stated hereinabove, the trial court followed the *Swift* case, *supra,* in denying modification (Appendix B, 16a, Petition). The formula adopted in the *Swift* case has been followed by many courts. A few examples are cited.

In *Western Union Telegraph Company* v. *International Brotherhood, Etc.,* 133 F. 2d 955, the Circuit Court reversed a modification of the injunction and remanded the case to the District Court to determine whether appellees had mended their ways and to inquire into their good faith and whether they came into court with clean hands. The opinion quoted from the *Swift* case as follows:

> "In the consideration of this question it is well to remember the admonition of the court in the Swift case, supra, 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen condition should lead the court to change what was decreed after years of litigation."

In the case of *Walling, Etc.* v. *Harnischfeger,* 142 F. Supp. 202, a motion to vocate and dissolve an injunction was denied because the record showed no substantial change except that the injunction had been complied with over a long period of time.

In *United States* v. *Radio Corporation of America,* 46 F. Supp. 654, the court said that modification must be consistent with the purpose of the original decrees

and calculated to effectuate and not thwart their basic purpose.

In *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244, a motion to modify an injunction under Rule 60(b) was denied by the District Court, the denial being affirmed by the Court of Appeals. The opinion, citing the *Swift* case, held that there had been no adequate showing either of changed conditions making continuation of the injunction inequitable or that operation of the injunction could not have the intended effect.

In Degenhart v. *Harford*, 59 Ohio App. 552, 18 N. E. 2d 990, the court refused to modify an injunction notwithstanding a change in the zoning law permitting funeral homes within residential districts. The court found that the change in the law did not alter the factual circumstances that the operation of such home would be a nuisance.

The question of whether a change in law would warrant a modification of an injunction was squarely presented to the court in the case of *Sunbeam Corporation* v. *Charles Appliances, Inc.*, 119 F. Supp. 492, where a motion by a dealer to vacate an injunction issued under the Fair Trade Law was denied, notwithstanding that the consent decree was issued prior to the decision of this Court holding that the Miller-Tydings Act did not apply to non-signers to price-fixing agreements. The court said:

> "The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modi-

fication of the decree. The circumstances and situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

It was lacking in the *Sunbeam* case because the McGuire Act was enacted to overcome the effect of the *Schwegmann* decision. In our case, the indispensable ingredient is lacking because the circumstances and situation of the parties have not changed so as to make it equitable to modify the decree. The change in the decisional law permitting negotiation for union security has not, of itself, brought about a change in the circumstances which either assure complete protection to all employees or which will guarantee in the future that certain employees will not be mistreated within the unions after becoming members thereof.

VII. CONCLUSION.

To sum up, the injunction sought to be modified is part of a consent decree. The consent decree arose out of, and gave form and substance to, an agreement by the parties to this case settling all issues raised in the original complaint. The change in the Railway Labor Act merely permits but does not require union security agreements. Petitioners did not make a clear showing in the court below of a grievous wrong evoked by new and unforeseen conditions. They did not come into court with clean hands.

This case does not present an important question of federal law which has not been settled by this Court.

Petitioners merely seek a review of the discretion of the trial court, but they have been unable to show an abuse of that discretion.

The decisions below are not in conflict with applicable decisions of this Court and other Courts of Appeal. On the contrary, they are in accord with such decisions.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

Marshall P. Eldred

MARSHALL P. ELDRED,
Board of Trade Building,
Louisville, Kentucky,
Attorney for Respondents Other Than Louisville and Nashville Railroad Company.

Of Counsel:
BROWN AND ELDRED,
Board of Trade Building,
Louisville, Kentucky.